No. 10,616

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLAIBOURNE RANDOLPH TATUM,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JACK W. BAGLEY, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 10,574 Jun. 14, 1944

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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Before: DENMAN, STEPHENS and HEALY, Circuit Judges.

STEPHENS, Circuit Judge.

Jack W. Bagley was convicted in the district court of knowingly and feloniously failing to comply with the order of the Selective Training and Service Board for induction into the armed services of the United States (Selective Training and Service Act of 1940, 54 Stat. 885, 50 USCA §§ 301-318, specifically § 311). He appeals from the judgment.

It is agreed that the order to report was made and that he has not complied therewith. At the trial he claimed, and he makes the same claim here, that he "had not received a hearing by the Hearing Officer such as the law granted him." Specifically, he claims that the order is void and, therefore, no order at all; that the Hearing Officer refused to inform the registrant, who was claiming to be a conscientious objector, as to the general nature and character of any evidence unfavorable to him; that the Hearing Officer misled the registrant by advising him that there was no evidence against him, after which the Hearing Officer based his adverse ruling upon evidence which he had notwithstanding his statement to the registrant. The latter further claimed that he was not given "a personal hearing by a local Draft Board," and at the trial written proposals of instructions, pertinent to such alleged defenses, were furnished the court with the request that they be

the religious sect of which he is a member, and had refused to classify him as a minister against the overwhelming weight of the evidence."

It seems to us that if the order in the Falbo case would not cease to be an order upon the showing that it was based upon "antipathy" to appellant's religious sect, then by parity of reasoning the order in our case would not cease to be an order upon the showing suggested. The Supreme Court took no note of the theory advanced by appellant and went directly to the heart of the question. It said [p. 554 of the opinion]: "Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." [See Billings v. Truesdell, ... US ....., (March 27, 1944) upon the subject of last step in the selective process.] The court in the Falbo case continued: "* * * But Congress apparently regarded a prompt and unhesitating obedience to orders issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

"Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made. * * *."

Since the Falbo case the Supreme Court has again spoken. In Billings v. Truesdell, supra, appears the following: "It should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for exhaustion of his administrative remedies. *Unless he follows that procedure he may not challenge the legality of his classification in the courts. It follows that one who follows that procedure has exhausted all necessary administrative steps, and may then challenge an order in the courts.*" [Emphasis added.]

We conclude that a hearing out of which a Selective Service Board has issued its order directing registrant to report for service cannot be inquired into as a defense in a criminal proceeding in which the registrant is charged with failure to comply with the order.

The Motion.

Coincident with the oral argument of the case on appeal before us appellant presented its motion to remand the case to the district court. We have treated the appeal first because in so doing, the facts need not be twice stated.

The basis of the motion is that appellant mistook the law when he failed to obey the order of the Selective Service Board to report for duty. He did not know at the time, he says, that his administrative remedies against obeying the order extended up to but not after the actual induction into the service as described in great particularity in the case of Billings v. Truesdell, supra, which came out sometime after the trial of his case. He now states by affidavit that he is willing to obey the order to report. It should not be understood that the affidavit indicates a willingness to be inducted into the services of his country. However, his continuing unwillingness to be inducted is in no wise prejudicial. He has a perfect right, which we must and do respect, to hold and in the proper proceeding to assert his conscientious views.

Appellant argues that he did not understand the applicable law until the Supreme Court made it plain by Billings v. Truesdell, supra. It may be that appellant misapprehended his administrative remedies and for that reason did not pursue them prior to his indictment for failure to obey the order to report, but we know of no power of an appellate court to nullify the action taken by the enforcement authorities and the courts upon a showing of such misapprehension. He chose to act as he did, and, as it seems to us, we have no power whatever to reverse the conviction and remand the case so that he may chose another course. Appellant has not as yet been inducted, and it is quite possible even after affirmance of the conviction that he has adequate means of testing whether or not he has been accorded due process. Although it cannot be used to the full extent of the writ of error, the writ of habeas corpus has of late years been greatly enlarged, and where

the registrant has exhausted the remedies provided, he may test the "due process" question by resort to this remedial writ.

It is argued that former Chief Justice Hughes said in Patterson v. Alabama, 294 US 600-607: "We have frequently held that in the exercise of our jurisdiction we have power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act." This statement was made in a case where two persons had been condemned to death after a court trial in which they had been denied important constitutional rights. The two cases are not comparable. There is nothing in the instant case from which we could say, in the sense the expression was used by the great Chief Justice, that justice requires or authorizes us to act. No right has been denied appellant; no change of law or fact has come about. We can appropriately refer in the same way to the other cases cited by counsel. The cases of McNabb v. United States, 318 US 332, and Gros v. United States, 136 Fed(2d) 878, do not assist appellant. Those cases concerned violations of law in the use of oppressive and coercive methods by officers of the law in securing evidence against accused persons.

Counsel's reference to our "broad authority of judicial supervision over the administration of criminal justice" (borrowed from the McNabb opinion) does not give us a free hand to reverse and remand. We have no power to grant the relief requested. Appellant may yet submit his grievance to the courts in an appropriate proceeding, or he may seek executive relief or both as he may be advised.

The motion is denied and the judgment is affirmed.

(Endorsed:) Opinion. Filed Jun. 14, 1944. Paul P. O'Brien, Clerk.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The facts set forth by the appellant relative to the pleadings of this case are correctly stated.

The following is a brief statement of the essential facts disclosed by the evidence introduced at the trial.

The appellant, born March 15, 1913 at San Francisco, California, registered for Selective Service on October 16, 1940 with Local Board No. 89 of that City (T. p. 16). He filed his questionnaire with his Local Board on May 17, 1941, and in his questionnaire he stated that he was married and that his wife was dependent upon him for support (T. p. 16). The Board granted him a dependency deferment and classified him in Class III (T. p. 16). Subsequently the Board reopened his classification, and the appellant then for the first time requested a "Special Form for

Conscientious Objector", filed the same claiming exemption from both combatant and non-combatant service (Class IV-E) by reason of his religious training and belief (T. p. 17). Appellant requested a personal hearing before the members of the Board, the request was granted, the hearing was held on June 8, 1942, and after the hearing the Board continued the dependency deferment which it had previously granted (T. p. 17).

Thereafter the Board again reopened the appellant's classification, and notified the appellant that it had found him available for general military service, and had classified him in Class I-A (T. p. 17). The appellant requested another personal hearing before the Board, and the said hearing was held on November 20, 1942 (T. p. 17). The Board then changed the appellant's classification, finding him available for non-combatant military service (Class I-A-O), and notified him accordingly. The Board, however, refused to give the appellant a IV-E classification, and it likewise refused to grant appellant's request which he made for the first time on November 20, 1942, that he be given a classification of IV-D as a minister of the gospel (T. p. 17 and T. pp. 115-118). On November 20, 1942 the appellant filed an appeal from the decision of the Local Board to the Board of Appeal, and on June 1, 1943 the Board of Appeal unanimously placed the appellant in Class I-A, and the appellant was notified of such action on June 16, 1943 (T. p. 19). The file of the Local Board likewise discloses that as an incident of the appeal, a hearing was conducted by the Department of Justice under Section 5(g) of

the Selective Training and Service Act of 1940; that such hearing was held before a Hearing Officer in San Francisco, California, on March 30, 1943; that the appellant appeared accompanied by his wife and a Mr. and Mrs. Frederick W. Rosher; that all of them were heard, and that the Hearing Officer recommended that appellant's claim as a conscientious objector should not be sustained; that he should not remain in Class I-A-O as recommended by the Local Board, but instead should be placed in Class I-A (T. pp. 144-162). Appellant wrote a letter to the State Director of Selective Service requesting him to take a Presidential appeal in his behalf (T. pp. 193-211), but the State Director replied on July 1, 1943 that he had reviewed the appellant's file and that such action would not be warranted (T. pp. 211 and 212). On July 10, 1943 the Local Board mailed the appellant an order to report for induction into the land or naval forces of the United States at San Francisco, California, on the 26th day of July, 1943 (T. p. 19). Appellant admitted the receipt of the order to report for induction and his failure to report (T. p. 23). He also stated that he was unwilling to report to a camp for conscientious objectors (T. p. 23). Appellant was likewise mailed a "Notice of Delinquency" on July 26, 1943 (T. p. 19). Appellant replied by letter on July 30, 1943 (T. p. 124) to the Notice of Delinquency, and declared, after mentioning his affiliation with "Mankind United" (T. p. 131), that he would not report for induction into a service which he stated "is not God's" (T. p. 137). It was because of this failure to comply with the order of induction that

he was indicted for a violation of the Selective Training and Service Act of 1940 (50 U.S.C.A., Section 311).

THE ISSUES.

All of appellant's assignments of error raise but two issues which we believe may be fairly and correctly stated as follows:

I. May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?

II. Was the argument of the United States Attorney to the jury prejudicial misconduct?

POSITION OF THE GOVERNMENT.

The answer to the above stated questions is "No".

ARGUMENT.

I.

A DEFENDANT WHO HAS BEEN INDICTED FOR HIS FAILURE TO REPORT FOR INDUCTION INTO THE ARMED FORCES OF THE UNITED STATES MAY NOT DEFEND SUCH FAILURE IN A CRIMINAL PROSECUTION BY COLLATERALLY ATTACKING THE BOARD'S ADMINISTRATIVE ACTS.

The first issue above stated is precisely the one considered by the Supreme Court of the United States

in the case of *Falbo v. United States,* 320 U.S. 549, in which the said Court affirmed the conviction of the appellant. In its decision the Supreme Court said:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process. We think it was not."

To the same effect see also:

United States v. Bowles, 131 F. (2d) 818 (CCA-3) affirmed on another ground, 319 U.S. 333;

United States v. Grieme, 128 F. (2d) 811 (CCA-3);

Fletcher v. United States, 129 F. (2d) 262 (CCA-5);

United States v. Kauten, 133 F. (2d) 703 (CCA-2);

United States v. Mroz, 136 F. (2d) 221 (CCA-7);

Gutman v. United States (CCA-9), unreported, decided March 7, 1944, No. 10,488;

Bagley v. United States (CCA-9), decided June 14, 1944, No. 10,574.

Appellant places great stress on what he considers the failure of the Local Board and the Hearing Officer to follow Selective Service regulations, although there is nothing in the record of this case to warrant such an accusation. In the *Bagley* case, the appellant argued precisely the same points, but this Honorable

Court in that case affirmed the judgment of conviction, and predicated its decision on the *Falbo* case.

II.

THE UNITED STATES ATTORNEY DID NOT COMMIT PREJUDICIAL MISCONDUCT IN HIS ARGUMENT TO THE JURY.

As for the second issue, it is obvious that the United States Attorney did not commit any misconduct in his argument to the jury, prejudicial or otherwise. Certainly the United States Attorney had a right to speak as he did in view of the fact, as the record discloses, that among other things, appellant had boasted of his being a descendant of the Randolphs of Virginia (T. p. 25), had stated that the members of our armed forces are committing murder (T. pp. 38-39), had bitterly attacked the institutions of organized religion and its clergy (T. p. 129), and had declared that he would be a traitor to God if he entered the armed forces of the United States (T. p. 37). The appellant insists that the United States Attorney indulged in "accepted political tactics" by "waving a bloody shirt". This accusation is clearly unwarranted because it is totally unsubstantiated by the facts of this case. In his argument to the jury, the United States Attorney strictly adhered to the record, and nothing that he said could possibly be construed as an appeal to the prejudice of the jury. The quotation from *Viereck v. United States,* 63 Sup. Ct. 561, to which the appellant refers, is, therefore, not pertinent to the case at bar.

CONCLUSION.

In view of the fact that the appellant was not entitled under the authority of the *Falbo* case to raise the defense which he unsuccessfully attempted during his trial, and in view of the further fact that the United States Attorney did not commit misconduct, prejudicial or otherwise, we respectfully submit that the judgment of the District Court was correct and that it should be affirmed.

Dated, San Francisco,
June 30, 1944.

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